89-696

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF NEVADA,

Petitioner,

v.

SAMUEL K. SKINNER, Secretary of Transportation for the United States; and A. J. HORNER, Chief of the Nevada Division of the Federal Highway Administration,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Congress has enacted the National Speed Limit (23 U.S.C. § 154) in excess of its spending power and in violation of state sovereignty as guaranteed under the Tenth Amendment to the United States Constitution.

LIST OF PARTIES

Petitioner, plaintiff-appellant in the United States Court of Appeals for the Ninth Circuit, is the State of Nevada. Respondents, defendants-appellees in the Ninth Circuit, are Samuel K. Skinner, Secretary of Transportation for the United States (substituted per Federal Rule of Appellate Procedure 43(c)(1) for Elizabeth Dole and James M. Burnley II); and A. J. Horner, Chief of the Nevada Division of the Federal Highway Administration. Petitioner is hereafter referred to as the State as real party in interest. Respondents are hereafter referred to as United States or Federal Government.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Nevada, by and through its attorneys, Brian McKay, Attorney General of the State of Nevada; and Brooke A. Nielsen, Chief Deputy Attorney General, Department of Transportation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in

this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought was filed August 31, 1989. The order is reported at 884 F.2d 445 (9th Cir. 1989) and is reprinted as Appendix A hereto.

The order of the United States District Court for the District of Nevada, entered January 14, 1988, is an unreported opinion which is reprinted as Appendix B hereto.

JURISDICTION

Review is sought of the order of the Court of Appeals filed August 31, 1989. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner relies on the Tenth Amendment to the Constitution of the

United States:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people (Proposed in 1789, adopted 1791).

Petitioner also relies on Article I, Section 8, Clause 1 to the Constitution of the United States:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.

Petitioner seeks further relief based on Title 23 of the United States Code, Section 154, Pub.L. 93-643, § 114(a), Jan. 4, 1975, 88 Stat. 2286, as amended, reprinted herein as Appendix C. 23 U.S.C. § 154 (1986) provides in pertinent part:

> (a) The Secretary of Transportation shall not approve any project under section 106 in

> any State which as (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour, or (2) a speed limit on any other portion of a public highway within its jurisdiction which is not uniformly applicable to all types of motor vehicles using such portion of highway, if on November 1, 1973, such portion of highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. . . . (emphasis added).

Petitioner further relies on Title 23 of the United States Code, Section 145, added Pub.L. 93-87, Title I, § 123(a), Aug. 13, 1973, 87 Stat. 261, which provides:

> The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

STATEMENT OF THE CASE

On the 14th day of June, 1985, the

Nevada Legislature enacted Chapter 678 of the Nevada Revised Statutes, codified at Nev. Rev. Stat. § 484.369 (1985), and attached hereto as Appendix E. Chapter 678 authorized the State of Nevada to set a maximum speed limit of or not greater than seventy (70) miles per hour, in the event the federal government failed to authorize a national maximum speed limit at a speed greater than sixty (60) miles per hour. However, this legislation contained a specific provision for its expiration upon the withholding of federal funding for Nevada's highways. In such an event, the public policy objectives of the Nevada Legislature would be abandoned and the maximum fifty-five (55) miles per hour speed limit would be reinstated.

On the 30th day of June, 1986, the Nevada Department of Transportation submitted a federal-aid highway project

numbered RS-221(2) for approval to then Secretary of Transportation for the United States, Elizabeth Dole, by and through the Secretary's representatives in the Nevada Division of the Federal Highway Administration (FHWA). On July 1, 1986, A. J. Horner, Chief of the Nevada Division of the FHWA, formally advised the Nevada Department of Transportation that approval of project RS-221(2) and all future federal-aid highway projects would be withheld by the Secretary of Transportation until the State of Nevada demonstrated compliance with the provisions of Section 154 of Title 23 to the United States Code. It was at this time that the provisions of Section 484.369(3) of the Nevada Revised Statutes expired.

The State of Nevada brought an action for declaratory and injunctive relief in the United States District

Court for the District of Nevada against the United States of America, the Secretary of the Department of Transportation, and the Chief of the Nevada Division of the FHWA, seeking the court's declaration that 23 U.S.C. § 154 is unconstitutional. The State alleged that Section 154 was enacted in violation of its sovereign authority protected by the Tenth Amendment to the United States Constitution, and further that this legislation was enacted in excess of Congress' authority under Article I, Section 8, Clause 1 of the United States Constitution. The District Court granted the federal government's motion for summary judgment, which judgment was entered January 14, 1989.

Petitioner filed a timely appeal from the decision of the district court. Oral argument occurred on June 29, 1989, before a panel of three justices of the appellate court.

The opinion of the court of appeals affirming the district court was filed on August 31, 1989. The appellate court held inter alia, that the national speed limit is constitutional. Petitioner seeks certiorari relief on the issue of its fundamental right to determine the speed limit upon all roads and highways within its borders. Further, petitioner seeks a determination that this fundamental right be affirmed and protected from improper federal intrusion under congressional commerce and spending power.

REASONS FOR GRANTING THE WRIT

A.

The United States Court of Appeals for the Ninth Circuit has Decided the Constitutionality of the National Speed Limit, Which Raises Important Questions of Federal Law Fundamental to the Distribution of Powers Between the Federal Government and the States, Which Have Not Been, But Should Be Settled by This Court.

The United States Court of Appeals

for the Ninth Circuit in State of Nevada v. Skinner, et al., 884 F.2d 445 (9th Cir. 1989), upheld the constitutionality of the national speed limit. See Appendix A. This decision raises important questions regarding the distribution of powers between the federal government and the states, and regarding the fundamental limitations on congressional spending power and commerce clause authority. In accordance with the provisions of Sup. Ct. R. 17.1(c), review on writ of certiorari is appropriate where a federal court of appeals has decided important questions of federal law which have not been, but should be settled by this Court.

B.

The National Speed Limit (23 U.S.C. § 154) Improperly Invades upon the State of Nevada's Fundamental Rights of Sovereignty as Protected under the Tenth Amendment to the United States Constitution.

The issue which must be decided by

this Court is whether the statutory control of vehicle speed on highways is the prerogative of the states under the Tenth Amendment or the proper subject of congressional legislation. This Court's decision in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1986) raises grave concerns regarding the continued viability of the Tenth Amendment. Nevertheless, if the Tenth Amendment retains any of its original founding purpose, then in this case, the sovereign authority of the State of Nevada to govern its roadways has been invaded by the passage of the national maximum speed limit.

The analysis of this issue logically begins with the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. (Proposed 1789, adopted 1791).

The regulation of vehicle speed on the

highways is clearly not prohibited from state regulation by the Constitution. Therefore, unless it has been delegated to the United States, it remains to this day a prerogative of each individual state.

The language of the federal-aid highway act clearly relies on the well-established notion that the regulation of highways is a traditional state function. This is specifically recognized at 23 U.S.C. § 145:

> The authorization of appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

The language of this statute unambiguously reflects Congress' intent not to preempt the field of highway regulations by its enactment of the federal-aid

highway act. The states are given the freedom to select which projects will receive federal aid and thereby be made subject to the law and regulations of the federal-aid highway act.

This Court has historically recognized that the construction, maintenance and regulation of highways is a local function. In Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 at 523, 79 S.Ct. 962, 964 (1959), the Court stated that:

> [t]he power of the state to regulate the use of its highways is broad and pervasive. Twenty years earlier the Court noted that [f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways. South Carolina State Highway v. Barnwell Bros., Inc., 303 U.S. 177 at 187, 58 S.Ct. 510, 82 L.Ed. 34; Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969; Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167.

See also Raymond Motor Transportation,

Inc., et al. v. Rice, et al., 434 U.S. 424 at 444, n. 18, 98 S.Ct. 787, 795 (1978) (this Court recognized that "the States shoulder the primary responsibility for the construction, maintenance and policing of their highways, and that highway conditions may vary widely from State to State.") The court of appeals surprisingly rejects this notion, finding that highway regulation is a cooperative effort of local, state and federal authorities. See Appendix A at 32a.

However, by enacting 23 U.S.C. § 154, the national speed limit, Congress has delegated to itself state legislative power. Section 154 provides in pertinent part:

> (a) The Secretary of Transportation shall not approve any project under section 106 in any State which as (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour, ...

This statute circumvents the sovereign rights of states as protected by the Tenth Amendment, by delegating to Congress the power to police highways, which this Court has previously recognized as being primarily within the sphere of state authority. See Rice at 444, n. 18.

Congress' 1987 amendment of 23 U.S.C. § 154, raised the maximum speed limit to 65 m.p.h. in certain areas. Public Law 100-17, Title I, § 174, Apr. 2, 1987, 101 Stat. 218 (codified as amended at 23 U.S.C. § 154). Congress has thereby acknowledged that 55 m.p.h. is not necessary for fuel economy.

In addition, this amendment implies congressional recognition that 55 m.p.h. is not essential for safety reasons. In any event, the needs of highway safety are obviously dependent on local traffic and roadway conditions, and are best

determined at the local level. See Rice, supra.

Thus, the primary justifications offered for the national maximum speed limit cannot be rationally supported under the commerce authority delegated to Congress. Furthermore, as discussed hereinafter, the coercive nature of a total withholding of federal funding establishes that the law is not a proper exercise of the spending power delegated to Congress.

Under these circumstances, where the national maximum speed limit is not a valid exercise of any authority delegated to Congress, the regulation of vehicle speed is a sovereign right of the State of Nevada as guaranteed by the Tenth Amendment.

The Court of Appeals for the Ninth Circuit relied on this Court's decision in Garcia, 469 U.S. at 528. The court of

appeals reasoned that Tenth Amendment interests are considered through the natural process of federalism, absent some extraordinary defect in the national political process. See Appendix A at p. 30a (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938)).

This argument is merely an ideal-ogical solution that is neither realistic nor in fact born out in practice. Given the size of Nevada's voice in Congress and those of her sister states with similar interests, the national political process will not protect the State's Tenth Amendment interests. As this Court pointed out in Rice, supra, "highway conditions may vary from State to State." Therefore, the State of Nevada should not be forced to acquiesce to a law that invades its sovereignty and further disregards the uniqueness of the State in

favor of generic law.

Even though this Court has for the most part overturned the premise of National League of Cities v. Usery, 426 U.S. 833 (1976), the State would urge this Court to consider the reasoning in that case. It is petitioners' view that the blanket solutions of Garcia are not practical in every situation.

Chief Justice Rehnquist in delivering the majority opinion, in National League of Cities at 852, addressed concerns that Congress was increasing its power in a fashion that would impair the States' "ability to function effectively in a federal system" (citing Fry v. United States, 421 U.S. at 542, 547 n. 7 (1975)). The majority (Burger, C.J., and Stewart, Blackman, Powell, JJ., joined) quoting Lane County v. Oregon, 74 U.S. (7 Wall. 71) at 76 (1869), in reaching its decision on the state's power to deter-

mine questions of labor concerning those they employed, stated that the pivotal question to be resolved was "whether these . . . are functions essential to [a] separate and independent existence." Id. at 845.

In the case at hand, the court of appeals concluded that even if National League of Cities were applicable, the national speed limit would not infringe upon any integral state function. See Appendix A at 31a. However, this holding simply ignores this Court's reasoning in National League of Cities and previous decisions.

Just as this Court found in National League of Cities, at 851, the national speed limit significantly alters the state's ability to control the roads and highways within its jurisdiction. The State of Nevada is in the best position to determine appropriate speed limits

through the vast open areas of the state, known in part for its size and for the tremendous distances between its communities. This Court in Rice, supra, has recognized the uniqueness of the various states, and thus, that the maintenance, construction and policing of the highways is primarily a local function. Therefore, the national speed limit denies the State of Nevada its sovereignty through its abrogation of traditional local functions integral to the state's comprehensive responsibilities in the maintenance, construction and policing of highways in its jurisdiction.

The State urges this Court to reestablish a doctrine of states' rights which will ensure the sovereignty guaranteed to each state under the Tenth Amendment, as intended by the Framers of the Constitution, and as previously recognized by this Court.

C.

The National Speed Limit (23 U.S.C. § 154), enacted under congressional spending power cannot be upheld under the commerce clause.

The court below ignores the limitations on congressional spending power which this Court defined in South Dakota v. Dole, ____ U.S. ____, 107 S.Ct. 2793, at 2796 (1987), by holding that these limitations do not apply whenever it appears that Congress could pass direct regulation under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, or under some other enumerated power. See Appendix A at 18a. In other words, the spending power limitations are meaningless whenever the court can conceive that the particular federal requirement could have been enacted under some other enumerated power such as the commerce clause. Thus, the constitutional doctrine, as announced

by this Court concerning the spending power, is completely vitiated.

Although this Court in Fullilove v. Klutznick, 448 U.S. 448, 475 (1980) (opinion of Burger, C.J.) affirmed a spending clause enactment (the minority business enterprise program) noting that Congress could have achieved its objectives through direct regulation, the Court has not held that this is the final test to be applied when considering the propriety of spending power legislation. Nor has this Court specifically held that the mere possibility of congressional action under the commerce clause or some other enumerated power will supplant the usual exam- ination and analysis of spending power limitations. The illogic and danger of such constitutional doctrine seems apparent. First, if Congress' commerce clause power is as limitless as it appears, then in reality

there must be virtually no limitation on congressional spending power, since only Congress itself defines the breadth of the commerce power. See Katzenbach v. McClung, 379 U.S. 294, 303-4 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1954); Gibbons v. Ogden, 14 U.S. (1 Wheat.) 196 (1824).

Petitioner believes the national maximum speed limit, 23 U.S.C. § 154, violates the known limitations on congressional spending authority. Infra, pp. 13-29. This law should not escape constitutional scrutiny under these limitations by resorting to the simple expedient of an imagined commerce clause regulation. When Congress chooses to act under a particular enumerated power, such as the spending clause, Art. I, Sec. 8, Cl. 1, the propriety of its action must be tested under the constitutional doctrine relevant to that provision. The

spending power is limited, as announced by this Court in South Dakota v. Dole, and when those limits are exceeded, the federal law should be invalidated by the courts. An invalid spending clause enactment should not be allowed refuge under the umbrella of the commerce clause or other constitutional provision.

D.

The National Speed Limit (23 U.S.C. § 154) is coercive legislation enacted in violation of Federal Spending Power.

The court of appeals examined the limitations on the scope of the federal spending power as follows:

> First, the exercise of the spending power must be in pursuit of the general welfare. See Oklahoma v. Civil Service Comm'n., 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619, 640 (1937). Second, the conditions on receipt of federal funds must be reasonably related to the articulated goal. South Dakota v. Dole, 107 S.Ct. at 2796. Third, Congress' intent to condition

> funds on a particular action must be authoritative and unambiguous, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Fourth, the federal legislation may be invalid if an independent constitutional provision bar rule "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 107 S.Ct. at 2798.

See Appendix A at 12a.

The national speed limit violates the first spending clause restriction noted by the court. The expenditure must serve the general welfare. It cannot be readily concluded that the speed limit requirement serves the general public welfare. The argument of "public safety" frequently offered in support of the 55 m.p.h. limit, has been substantially undermined by the recent action of

Congress to allow higher speed limits in some areas. Congress itself has determined that 55 m.p.h. is not necessary to safe highway travel. See 1987 Highway Act, Title I, § 174.

Section 154 also violates the third restriction on the federal spending power noted by Chief Justice Rehnquist in South Dakota v. Dole, supra, at 2796. A condition on a federal grant may ". . . be illegitimate if . . . [it is] unrelated 'to the federal interest in particular national projects or programs.'" Id. The express purpose of the federal-aid highway program is found in 23 U.S.C. § 101(b), attached as Appendix D hereto. The stated federal purposes to be served by the highway law are commerce, defense and safety. The 55 m.p.h. limit is not essential to safe highway travel, since Congress itself has raised the speed limit on the rural interstate highways.

1987 Highway Act, Title I, § 174. Additionally, there appears to be no related commercial or defense purpose served by the speed limit.

Finally, this provision of federal law is highly coercive and thus, violates the last limitation on the spending power articulated by this Court in South Dakota v. Dole. This Court stated in South Dakota v. Dole that "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' Stewart Machine Co. v. Davis, 301 U.S. at 590, 57 S.Ct. at 892." Dole, supra at 2798. In Dole, this Court upheld the national drinking age, which is also imposed as a condition on the receipt of federal-aid highway funds because, ". . . all South Dakota would lose if she adheres to her chosen course

as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs . . ." Dole at 2798. Unlike the mild consequences to be suffered by South Dakota as a result of its refusal to follow the prescribed drinking age, Nevada faces total withdrawal of federal funds.

In its rejection of petitioner's argument that the law is coercive, the court below stated that the coercion test ". . . has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." See Appendix A at 15a, 16a. The lower court concluded in part that the coercion test may no longer be applicable in light of this Court's decision in Garcia, supra. Id. at 17a. Nonetheless, the court reasoned that whatever concerns there were regarding coercion, sover-

eignty is adequately protected by the national political process. Id. In this fashion the court below completely ignores this Court's holding in South Dakota v. Dole that coercion may be found where the penalty for noncompliance is excessive. In this case, the total withholding of federal funds is obviously coercive. Nevada has no choice but to submit.

The option given to the State of Nevada to refuse all federal funds is in reality no option at all. The utter dependence of Nevada's highway system on the continued receipt of federal-aid is undisputed. The loss of these funds would have catastrophic consequences in Nevada. The court of appeals' proposition that the State is free to raise taxes to generate funds to offset the denial of federal funding is absurd. See Appendix A at 16a, n. 5. The court's

alternative would do nothing more than place a "chilling effect" on the State's sovereignty by placing the State in a position to choose federal funding over the catastrophic alternative that would unduly burden the State's citizens with higher taxes, which would adversely effect the State's economy. Under these circumstances, the law is an unreasonable and coercive exercise of federal spending power.

CONCLUSION

For the reasons stated above, petitioner respectfully requests this Court to grant the petition for writ of certiorari and reverse the decision of

the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STATE OF NEVADA, Plaintiff-Appellant, v. SAMUEL K. SKINNER,* Secretary of Transportation for the United States; and A.J. HORNER, Chief of the Nevada Division of the Federal Highway Administration, Defendants-Appellees.	)	No. 88-2586 D.C. No. CV-N-86-318-BRT OPINION

Appeal from the United States District Court for the District of Nevada
Bruce R. Thompson, Jr.,
Senior District Judge, Presiding
Argued and Submitted June 29, 1989
San Francisco, California

Before: TANG, REINHARDT and WIGGINS, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Constitutional Law

The court affirmed a judgment in favor of the U.S. Secretary of Transportation in a state suit challenging the

constitutionality of the national speed limit. The court held that the limit could be sustained under the Commerce Clause, precluding determination of whether the limit violated any coercion limitation on the federal government's spending and taxing power.

In 1973, Congress required states to post maximum speed limits of 55 miles per hour on all highways, including roads not directly part of the interstate network, as a condition for receiving federal funds under the Federal Aid Highway Act. In 1985, appellant State of Nevada passed legislation increasing the speed limit on certain Nevada highways to 70 miles per hour. An agent of the appellee Secretary of Transportation advised Nevada that future state highway funding would be withheld unless the state reduced its speed limit to conform to the national limit, and Nevada's limit was then reduced to 55 miles per hour. Nevada

sued in district court for injunctive and declarative relief, contending that the national limit violated the "coercion" limitation on the federal government's Spending and Taxing Power. The court granted summary judgment for the United States.

[1] Congress has broad powers to further policy objectives by conditioning receipt of federal moneys upon the recipient's compliance with federal statutory directives, and Congress has frequently promulgated legislation in pursuit of the general welfare reaching far beyond other enumerated constitutional powers. [2] Nevada based its claim on a coercion theory, arguing that the federal government may not, except in certain circumstances, condition receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions. [3] The court questioned the vitality of the

coercion test in in [sic] light of recent Supreme Court authority. [4] The court did not, however, rule on the coercion theory, holding instead that (1) if Congress had authority under an enumerated power other than the Spending Power to compel the state through direct regulation to change its practices, it could also achieve that result through the Spending Power, and (2) in this case Congress could have relief on its authority under the Commerce Clause to establish a national speed limit. [5] If the Highway Act could be sustained under the Commerce Clause, the court observed, the coercion test was simply inapplicable, whether or not that test applied in Spending Power cases not involving actions within the scope of the other enumerated powers. [6] The Commerce Clause forms the broadest base of Congressional power. Not only does Congress have authority over the instrumentalities

of interstate channels, it may also regulate activities affecting commerce even when the activities are wholly intrastate in character. [7] Looking to this case, the court easily saw links between the national speed limit and interstate commerce, since control of traffic over roads significantly affects the economy. [8] The court rejected Nevada's argument that lowering the speed limit would inhibit commerce. [9] The court also pointed to the oil crisis of the early 1970s, describing the 55 mph speed limit as a reasoned response to problems posed by that crisis. [10] Moreover, Congress could certainly conclude that, even if there was no present emergency, there was a long term relationship between energy conservation and commercial development. [11] The court also addressed Nevada's argument that the federal government had intruded upon Tenth Amendment limitations upon the Commerce Power, observing

that Nevada's forum for raising a claim of infringed sovereignty lay with the legislature, not the judiciary. [12] Further, the control of roads and highways has not traditionally fallen under plenary state control but under the cooperative agreement of state, local, and federal officials. [13] Finally, the court rejected an argument that federal regulations had effectively commandeered Nevada's regulatory power, requiring Nevada unwillingly to enforce a national speed limit with local resources. Nevada's complaints must be, the court stated, resolved in the legislative process. [14] Moreover, the national speed limit required the state police to enforce a standard only marginally different from the ordinary state rule.

COUNSEL

Brian McKay, Attorney General of Nevada, Carson City, Nevada, Brooke A. Nielsen, Chief Deputy Attorney General, Nevada

Department of Transportation, Carson City, Nevada, for the plaintiff-appellant.

Shirley Smith, United States Attorneys Office, Reno, Nevada, Sandra M. Schraibman, Department of Justice, Washington, D.C., Leonard Schaitman, Department of Justice, Washington, D.C., and Robert V. Zener, Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

This case raises the first challenge to the constitutionality of the national speed limit. The constitutional question is a fundamental one involving the distribution of powers between the federal government and the states. After fully considering the relevant issues, we decide in favor of the federal government and uphold the national speed limit.

In 1916, Congress enacted the

Federal Aid Highway Act ("the Highway Act"). Under the Highway Act, the Federal Government provides funds directly to the States for maintenance of their highways. In 1973, Congress passed the Emergency Highway Energy Conservation Act which was permanently codified as a part of the Highway Act. It required the States as a precondition to receiving federal funds to post a maximum speed limit of 55 miles per hour (mph) on all highways, including secondary roads that were not directly part of the interstate network. While Congress did not order the States to conform their speed limits to the new national standard, it imposed a draconian consequence for noncompliance, denial of all future federal highway grants.

The events giving rise to the current controversy began in June of 1985. In that month, the Nevada state legislature passed legislation increasing the

speed limit on Nevada highways. See 1985 Nev. Stats. 678 § 3, codified at Nev. Rev. Stats. § 484.369 (1985). The new statute, inter alia, permitted the Nevada Department of Transportation (Nevada DOT) to post a limit of 70 mph. Because of the state's concern over the reaction of the federal government, the statute contained a self-executing sunset provision. It required the 70 mph limit to be lowered to the national speed limit if and when federal officials threatened to cut off state highway aid.

Section 484.369 went into effect on July 1, 1986. Acting pursuant to their statutory authority, officials of the Nevada DOT established a 70 mph speed limit on a thirty-three mile stretch of Interstate Highway 80 (I-80) between the East Fernley Interchange and the I-80 junction with I-95 west of Lovelock, Nevada at 7:30 a.m. on July 1. The federal government responded with

alacrity. Approximately sixty seconds after the state's action, appellee A. J. Horner, Chief of the Nevada Division of the Federal Highway Administration, formally advised the Nevada DOT that all future federal funds for state highways would be withheld unless the state reduced the I-80 speed limit so as to comply with the national speed limit. Concurrent with this notice, the 70 mph limit expired by its own terms.[1]

Nevada sued in United States District Court for injunctive and declaratory relief against enforcement of 23 U.S.C. § 154. The state contended that because the Highway Act threatened withholding of approximately 95% of all of Nevada's highway funds, it had no real choice but to comply with the national speed limit provisions. Consequently, Nevada argued, the national limit violated the "coercion" limit on the Federal Government's Spending Power. The

district court rejected this argument and ordered summary judgment for the United States. Nevada appealed, and we affirm.

I. The Coercion Test in the Abstract

[1] Article I specifically grants the Spending and Taxing Powers to Congress. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Pursuant to this authority, Congress may condition the receipt of funds, by states or others, on compliance with federal directives. The Supreme Court has clearly, and repeatedly, declared that "Congress may further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." South Dakota v. Dole, 107 S.Ct. 2793, 2796 (1987) (quoting Fullilove v. Klutznick, 448 U.S.

448, 474 (1980) (opinion of Burger, C.J.)). Moreover, Congress frequently, and with an almost unblemished record of success,[2] has under its spending authority promulgated legislation in pursuit of the general welfare that reaches beyond its other enumerated Constitutional power. See South Dakota v. Dole, 107 S.Ct. 2793, 2796 (1987) (collecting cases).

[2] There are, however, limits upon the scope of the Spending Power. The Supreme Court has articulated at least four such restrictions. First, the exercise of the spending power must be in pursuit of the general welfare. See Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619, 640 (1937). Second, the conditions on receipt of federal funds must be reasonably related to the articulated goal. South Dakota v. Dole, 107 S.Ct. at 2796. Third, Congress' intent to condition

funds on a particular action must be authoritative and unambiguous, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Fourth, the federal legislation may be invalid if an independent constitutional provision bars Congressional actions. The independent constitutional bar rule "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 107 S.Ct. at 2798.

Nevada does not seriously rely on any of these restrictions.[3] Instead, it bases its claim on the indistinct coercion limitation first articulated in Steward Machine C. v. Davis, 301 U.S. 548, 590 (1937) and most recently men-

tioned in South Dakota v. Dole, 107 S.Ct. at 2798. "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Id. (quoting Steward Machine, 301 U.S. at 590). But cf. New Hampshire Department of Employment Security v. Marshall, 616 F.2d 240, 246 (1st Cir. 1980) ("the carrot has [not] become a club because rewards for conforming have increased"). According to the coercion theory, the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions.

Appellant argues that the threatened loss of 95% of its highway funds deprives it of any real choice; practically, it is forced, it says, to adhere to the nation-

al speed limit.[4] Ultimately, Nevada argues, the federal government's legislation would deprive the state of its sovereignty and violate principles of federalism.

The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party. See Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C. Cir. 1981) ("although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition"). Certainly, one reason for the federal courts' lack of enthusiasm for the theory is its elusiveness. Nevada, while baldly stating that withholding 95% of highways funds constitutes "coercion," has not given us any principled definition of the word. we can hardly fault appellant, however, because our own inquiry has left us with only a

series of unanswered questions. Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available? There are other interesting and more fundamental questions. For example, should the fact that Nevada, unlike most states, fails to impose a state income tax on its residents play a party in our analysis? Or, to put the question more basically, can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds -- or is the state merely presented with hard political choices?[5] The difficulty if

not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.[6]

[3] Moreover, we would seriously question the vitality of the coercion test in light of the Supreme Court's holding in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). See infra § III. The purpose of the coercion test is to protect state sovereignty from federal incursions. If this sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise. See Oklahoma v. Schweiker, 635 F.2d at 414.

[4] Fortunately, under the facts of this case, we need not decide whether the coercion theory survives both its own

doctrinal failings and recent changes in constitutional theory adopted by the Court. We hold, instead, that (1) if Congress has the authority under an enumerated power (other than the Spending Power) to compel the States through direct regulation to change its practices, then it may also achieve that result through the more gentle commands of the Spending Power, and (2) in this case, Congress could have relief on its authority under the Commerce Clause to establish a national speed limit.

II. The Coercion Test and the Commerce Clause

We first explain why the provisions relating to the national speed limit must be upheld if Congress could impose those limits under an enumerated power, other than the Spending Power.[7] The central debate of the Spending Power cases has always been whether Congress may exercise authority <u>beyond</u> the strict limitations

imposed by the other enumerated powers specified in the Constitution. See Butler, 297 U.S. at 66. See generally Rosenthal, Conditional Spending and the Constitution, 39 Stan. L.Rev. 1103 (1987). No one has yet questioned the right of the federal government to act, under the Spending Power,[8] within the ambit of those other enumerated powers. Certainly, congress may use its Spending Power to encourage states to participate in cooperative and voluntary ventures within the parameters of the Commerce Clause. "The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the [Minority Business Enterprise] program, then it may do so under the Spending Power." Fullilove v. Klutznick, 448 U.S. 448, 475 (1980) (opinion of Burger, C.J.).

Nevada, however, argues that the federal government cannot engage in coercive conduct in the exercise of its Spending Power, even when the particular exercise is within the limitations of the Commerce Clause. We see two overriding arguments for rejecting appellant's theory, aside from the dubious vitality of the coercion test. First, if Congress has the authority under the Commerce Clause to order a state directly to comply with a particular standard such as a 55-mile-per-hour speed law, we see no reason why Congress should be prohibited from reaching that same result indirectly by withholding funds if the state fails to comply with that standard. Withholding funds is simply a lesser form of coercion than enacting a flat Congressional mandate with which a state is obligated to comply. A contrary view would elevate the form of the legislation over its function.

Second, we think appellant's claim can be answered by reference to the purpose of the coercion test. The coercion test flows from a fear that the federal government could wield its Spending Power to infringe upon integral state functions. The test serves, in theory, as a protection of the federalist system. However, if the congressional action passes muster under the Commerce Clause (or some other non-Spending power) and the restraints of the Tenth Amendment, see infra §§ III and IV, there can be no reason to feat that the federal government is unconstitutionally intruding into areas of uniquely state concern. Since, as we explain below, no federalism concerns are implicated, the presence or absence of coercion is wholly irrelevant.

[5] In short, if the Highway Act can be sustained under the Commerce Clause, the coercion test is simply inapplicable, whether or not that test applies in

Spending Power cases not involving actions within the scope of the other enumerated powers.

III. The National Speed Limit and the Commerce Clause

[6] The Commerce Clause[9] forms the broadest base of Congressional power. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." Gibbons v. Ogden, 9 Wheat 1, 196 (1824). Not only does Congress have authority over the instrumentalities of and products in interstate channels, it may regulate activities "affecting commerce," even if, by themselves, the activity is purely intrastate in character. Perez v. United States, 402 U.S. 146, 150 (1971). See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).[10]

In determining whether Congress has exceeded its plenary authority under the Commerce Clause, our inquiry is a narrow one. A congressional finding that an activity affects interstate commerce must be afforded controlling deference if there is a rational basis for that judgment. See Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).[11] Here, where Congress has determined that there is a concrete link both between highways and interstate commerce and between the national speed limit and economic development,[12] we start with a strong presumption that the collective wisdom of the legislature is correct.

[7] Applying the Commerce Clause test to this case, we can easily see the links between the national speed limit and interstate commerce. First, the interstate highways,[13] and the feeder roads

that serve them, are the arteries of national commerce. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). It takes only a glance at our interstate highways to realize that a substantial portion of this country's trade passes over them. The mere fact that control of traffic on these roads may significantly affect our economy would justify the federal government's exercise of plenary authority in devising ways to preserve that commerce. Even when Congress has not preempted the field and the Commerce Clause lies dormant, state regulations that adversely infringe upon the movement of goods and services along these key paths may violate the Constitution. Id. In light of these facts, we can hardly say that when Congress acts to secure safe and efficient passage over the roads that it is acting outside the boundaries of its authority.[14]

[8] Even when Congress seeks to achieve

a goal within the purview of the Commerce Clause, its methods of implementation must be rationally related to meeting that goal. See Heart of Atlanta Motel, 379 U.S. at 262. Nevada suggests that Congress could not have been acting rationally in aid of the Commerce Clause because the lower national speed limit would inhibit rather than promote rapid commercial intercourse. This argument is clearly without merit; Congress is entitled to determine that a lower speed limit -- as well as a uniform one -- facilitates the safe passage of commerce through several states. Certainly, no one could quibble with the judgment that commerce that proceeds safety is more efficient than commerce slowed by accident or injuries.

[9] Second, the principal motivating force behind the national speed limit was the fears generated by the Arab Oil Embargo of the early 1970s. The petro-

leum embargo sponsored by the Organization of Petroleum Exporting Countries (OPEC) damaged the economies of the Western powers, leading to one of the worst recessions of this century. See generally Danielson, The Evolution of OPEC, 201-33 (1982) (discussing impact of energy crisis on economies of developed countries). See also FERC v. Mississippi, 456 U.S. 742, 757 (1982). Part of the Congressional reaction was to impose a lower national speed limit in order to conserve fuel and, thereby, revitalize commerce and protect the national defense. See 1973 U.S. Code Cong. & Admin. News 3345.[15] In light of the dramatic influence the energy crisis has had on the shape of American and international commerce, the 55 mph speed limit was a reasoned response on the part of Congress to the many serious problems posed by the crisis.[16]

[10] Nevada virtually concedes that

Congress had the authority to change the speed limit in response to international economic developments. However, appellant argues that the fact that Congress chose to raise the speed limit in 1987 to 65 mph on some roads signaled the end of the energy crisis and its impact on interstate commerce. Although the emphasis of the national speed limit has shifted somewhat over time, it is the function of Congress, and not the courts, to determine whether and when the national economic crisis provoked by the oil embargo and the resulting market dislocation has ended. Moreover, Congress may certainly conclude that, even if there is no present emergency, there exists a long-term relationship between energy conservation and commercial development. The mere fact that Congress has chosen to alter in limited respects the speed limit suggests only that shifts in energy policy, and advances in energy technol-

ogy, now permit a different balance between conservation, safety, and quicker travel. Congress has made its legislative determinations, and we are in no position to second-guess them.

We conclude that the 55/65 mph limit is rationally related to the Congressional goals that underlie [sic] the Highway Act and that those goals fall within the purview of the Commerce Clause. Thus, absent a Tenth Amendment bar, Congress had the power, under that clause, to adopt the national speed limit.

IV. The National Speed Limit and the Tenth Amendment

Even if the national speed limit falls within the broad ambit of the Commerce Clause, there may remain limitations on the exercise of federal power within this zone of authority. See generally L. Tribe, American Constitutional Law 378-88 (2d ed. 1988). Appel-

lant argues that the Tenth Amendment[17] carves out a sphere of state influence upon which even the Commerce power may not intrude. We disagree.

[11] The Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) answers appellant's concerns. In Garcia, the Court rejected the theory articulated in National League of Cities v. Usery, 426 U.S. 833, 852 (1976) that the federal government was powerless to enforce legislation against the States in "areas of traditional government functions." It replaced the state functions test of Usery with a process-based analysis of Tenth Amendment limitations. "[T]he principal and basis limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal government action." Garcia, 469 U.S. at

556.[18] Since the representatives of the States and local interests comprise the constituent parts of the federal government, "[t]he political process ensures that laws that unduly burden the States will not be promulgated." Id. Consequently, absent any "extraordinary defect" in the national political process, Nevada's forum for raising a claim of infringed sovereignty lies with the legislature, not the judiciary. See South Carolina v. Baker, 108 S.Ct. at 1360 (plurality opinion). Although the contours of the "extraordinary defect" test remains fuzzy, suffice it to say that Nevada has not alleged that it was excluded from the national political process or that it was "singled out in a way that left it politically isolated and powerless." Id. at 1361 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

[12] Moreover, even if we were to apply

the traditional government test of Usery, we do not believe that the national speed limit would infringe upon any integral state function. While the federal courts have, on occasion, given "lip service" to the notion of state control over roads, it has most frequently done so in the context of striking down state legislation as a burden on interstate commerce. See, e.g., Navajo Freight Lines, 359 U.S. at 523 (striking down Illinois mudflap regulation despite States "broad and pervasive" authority over highways). Nor is the federal government a newcomer to this field. Congress first promulgated the Federal Aid Highway Act in the first years of this century, and the task of building the Interstate Highway System has been an endeavor spanning four decades. Thus, the control of roads and highways has not traditionally fallen under plenary state control but under the cooperative agreement of state, local,

and federal officials. Even during the brief ascendancy of the National League of Cities doctrines, courts frequently upheld federal regulation of state highways. See, e.g., Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977) ("[t]he regulation of traffic on roads and highways, with its strong regional and interstate character . . . has long been considered to be a cooperative effort between City, State and federal authorities, with no single entity being able to provide or impose a comprehensive traffic system, and with federal power, where necessary, taking precedence") (emphasis added).[19] Cf. United Trans. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (upholding federal regulation of railroads).

[13] Finally, appellant argues that the federal regulations in force here effectively "commandeered" its regulatory power and required it to enforce unwill-

ingly the national speed limit with state personnel and local resources. Thus, it argues, violates the Tenth Amendment rule laid out in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982).[20] As a preliminary matter, we express substantial doubt as to whether FERC has survived the Supreme Court's decision in Garcia. "The extent to which the Tenth Amendment claim left open in FERC survives Garcia or poses constitutional limitations independent of those discussed in Garcia is far from clear." South Carolina v. Baker, 108 S.Ct. at 1361 (plurality opinion). The FERC Tenth Amendment claim rested on the same pillar of interference with state sovereignty as the theory rejected in Garcia, and there is, therefore, no apparent reason to think that the answer to that claim would now be any different than the answer given by the Supreme Court in Garcia. As that opinion teaches, Nevada's complaints

regarding cooption of state resources must be resolved in the legislative process; it is that process which protects the fundamental interests of the states.

[14] Even if pieces of FERC survive the Garcia decision, we do not believe that reversal would be required here. In FERC, the Supreme Court suggested that there may be some limits on the power of the federal government to use state regulatory machinery for its own ends. 456 U.S. at 759. However, the Court went on to hold that the provisions of Public Utilities Regulatory Policies Act (PURPA) did not run afoul of that rule because PURPA only required the state administrative agency to participate in its customary form of activity. Id. at 760. See also Testa v. Katt, 330 U.S. 386 (1947). Similarly, in this case, the national speed limit requires the state police to enforce a standard only margin-

ally different from the ordinary state rule. The state regulatory machinery is not diverted from its regular duties but continues to enforce the identical type of rule it has traditionally implemented. That the specific speed limit it now enforces results indirectly from a federal statute instead of exclusively from a state statute has little or nothing to do with the nature of the function performed by the state officers.[21] To hold that FERC controls here would be to "allow the States to disregard both the preeminent position held by federal law through the Nation, cf. Martin v. Hunter's Lessee, 1 Wheat. 304, 340-41 (1816), and the congressional determination that the federal rights . . . can appropriately be enforced through state adjudicatory machinery." FERC, 456 U.S. at 761. Even assuming that FERC has not outlived its usefulness, we think it clear that the national

speed limit does not unconstitutionally disrupt the state regulatory machinery.

V. Conclusion

Nevada has pegged its attack on the national speed limit on the wobbly legs of the coercion test. While we strongly doubt the vitality of that theory, we conclude that, alive or dead, it is of no consequence here. Congress could have mandated a national speed limit under its Commerce power: that it chose to enact a lesser restraint, by cutting off highway funds to states unwilling to adopt the designated limit, does not render its actions unconstitutional.

AFFIRMED.

Footnotes

1/ In 1987, after the fears of oil consumption that fueled the 1973 amendment receded to a degree, Congress again amended the Act. This time, it permitted the States to post a speed limit of 65 mph in low population density areas. Nevada argues that the change in the law does not affect the suit because the revised 55/65 mph limit would still conflict with the 70 mph state

enactment. The United States has expressed no disagreement with appellant on this point.

2/ Almost all the reservations about the permissible scope of the federal spending authority have come not from courts but from commentators. In fact, the parties have cited to us only one case -- the generally discredited Supreme Court opinion in United States v. Butler which overturned part of President Roosevelt's New Deal -- which declined to interpret expansively the congressional spending power. Commentators, however, have expressed greater doubts about the propriety and wisdom of conditioning federal largesse on compliance with federal policy. For some good general discussions, see Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L.Rev. 1103 (1987); Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 70 Colum. L.Rev. 847 (1979); Lacovara, How Far Can the Federal Camel Slip Its Nose Under the Academic Tent?, 4 J. Coll. & U.L. 223 (1977).

3/ In its brief, Nevada contends that the Highway Act is not reasonably related to any principles of general welfare. we think it clear that the legislation is reasonably designed to serve the general welfare, especially since the "concept of welfare or the opposite is shaped by Congress . . . ." South Dakota v. Dole, 107 S.Ct. at 2797 (quoting Helvering v. Davis, 301 U.S. at 645). Our analysis of the relationship between the Highway Act and the

Commerce Clause confirms our conviction. See infra § III.

4/ Nevada specifically contrasts this case with the situation in South Dakota v. Dole, where the punishment for not adhering to the national drinking age was the loss of only 5% of the funding from certain specified federal highway programs. 107 S.Ct. at 2798.

5/ Nevada is, of course, free to raise tax funds in the manner of its own choosing. At present, the people of Nevada have decided, through their elected representatives, not to impose an income tax. However, such restrictions -- whether they be in the form of state statutory or constitutional legislation or merely a failure to act -- are entirely self-imposed, and the state, as a sovereign entity, is free to change its method of generating public income whenever the people wish to do so.

6/ As professor Tribe has noted, the distinction between unlawful coercion and lawful pressure outlined in Butler "proved unworkable, and since its decision upholding the Social Security Administration, the Supreme Court has effectively ignored Butler in judging the limits of congressional spending power." L. Tribe, American Constitutional Law 322 (footnotes omitted).

7/ This argument was offered by the United States to the Supreme Court in South Dakota v. Dole. The federal government argued that the Twenty-First "Amendment . . . would

not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow a fortiori that the indirect inducement involved here is compatible with the Twenty-First Amendment." 107 S.Ct. at 2795. The Court, however, expressly declined to reach the issue. Id. at 2795-96.

8/ We have accepted, for the purposes of this opinion, the decision of the parties to frame the Highway Act as an exercise of the Spending Power. However, Congress has noted that the Highway Act serves "local and interstate commerce . . . national and civil defense," and there is substantial doubt that the Highway Act can be accurately portrayed only as an exercise of one enumerated power. We, however, do not think that mining history for evidence of legislative intent is useful exercise. Congress is not required to identify the precise source of its authority when it enacts legislation. It is the duty of Congress to promulgate legislation, and it is the function of the courts to determine whether Congress has acted within the bounds of federal power.

9/ The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

10/ Wickard v. Filburn is, of course, the quintessential example of the broad scope of the Congressional

power over commerce. In Wickard, Congress sought to regulate wheat production that was solely for home consumption. The Supreme Court upheld the direct regulation on a [sic] the theory that that the tyranny of small decisions about inclusion or exclusion of home production from the national market could affect national price and supply.

11/ In this case, Congress made explicit findings about the interrelationship between interstate highways, speed limits, and commerce. See 1956 U.S. Code Cong. & Admin. News 2822.

12/ The Supreme Court long ago abandoned the traditional distinction between commerce and other forms of economic interactions. In the place of this rigid dichotomy, the Court has adopted a theory that recognizes the interdependence between commerce and other types of economic relationships. Compare United States v. E.C. Knight Co., 156 U.S. 1 (1895) ("Commerce succeeds to manufacture and is not part of it") with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (integration of labor relationships and commerce).

13/ We are primarily concerned with the interstate highway system here because Nevada chose to post the 70 mph speed limit on a strech [sic] of I-80 that is part of the Interstate Highway System.

14/ The legislative history of the Emergency Highway Energy Conservation Act, which was ultimately

codified within the Federal Aid Highway Act, shows that it was initially conceived of primarily but not exclusively as an energy saving device. However, as concerns over energy shortfalls dwindled over time, the legislation has become increasingly viewed as a safety measure. Consequently, we address both aspects of the 55/65 mph speed limit.

15/ The Emergency Highway Energy Conservation Act of 1973 was only one of many bills passed by Congress that year in an attempt to control the adverse effects of the energy crisis. See, e.g., the Trans-Alaskan Pipeline Act and the Emergency Petroleum Allocation Act.

16/ We need not consider here Congress' authority to act under its national defense powers.

17/ We use the Tenth Amendment "to encompass any implied constitutional limitations on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." South Carolina v. Baker, 108 S.Ct. 1355, 1360 n.4 (1988). See also Note, Does the Tenth Amendment Pose Any Judicial Limit in the Commerce Clause After Garcia v. San Antonio Metropolitan Transit Authority and South Carolina v. Baker, 1989 B.Y.U. L.Rev. 231 (1989).

18/ The theory in Garcia flowed from a seminal law review article which argued that the principal method of

protecting federalism rested in the make-up of the federal government itself. See Eschsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L.Rev. 543 (1954).

19/ The Second Circuit, in Friends of the Earth, noted that the Supreme Court in Usery had specifically reaffirmed its decision in United States v. California, 297 U.S. 175 (1936) (railroads within scope of Commerce Clause power). The Usery Court distinguished the California case on the ground that the interstate character of the railroad system proved that it was not regarded as an integral part of the state's governmental activities.

20/ See also Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), vacated and remanded on grounds of mootness sub nom., 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975); vacated and remanded on grounds of mootness sub nom Environmental Protection Agency v. Brown, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated and remanded on grounds of mootness, 431 U.S. 99 (1977).

21/ This case closely follows the particular facts of South Dakota v. Dole. However, there, the Court, in discussing the Tenth Amendment limitations on the national drinking age rule, did not even mention that the FERC rule stood as a potential barrier to federal legislation. 107 S.Ct. at 2798.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

UNITED STATES OF AMERICA: ELIZABETH DOLE, Secretary of the Department of Transportation, et al.,

Defendants.

Case No. CV-N-86-318-BRT

ORDER GRANTING SUMMARY JUDGMENT

The plaintiff and defendants move for summary judgment. This case stems from the national energy crisis of 1974. Congress enacted 23 U.S.C. § 154(a)(1): "(a) The Secretary of Transportation shall not approve any project under section 106 in any State which has (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour."

Seeking to raise the fifty-five mile per hour speed limit, the state of Nevada brought this action. The state of Nevada

has stated explicitly that it does not wish to jeopardize its receipts from the federal government of federal-aid highway funds. The state of Nevada charges that Section 154 is violative of both the taxing and spending power granted to Congress under the Constitution, Article I, Section 8, Cl. 1, and the Tenth Amendment. The state further alleges that the actions of the Secretary in adhering to the congressional mandate of Section 154 are arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law and in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Emergency Highway Conservation Act, Pub. L. 93-239, 87 Stat. 1046 (1974), precluded the Secretary of Transportation from approving any federal funds for federal highway projects in states which had a maximum speed limit in excess of fifty-five miles per hour on

the public highways. The congressional record discloses that while Congress was concerned about the national energy crisis, there was also a belief that the fifty-five mile per hour speed limit would save lives. See, e.g., 119 Congressional Record 39257, 39258, 41646.

As an incentive to the states, Congress provided that federal-aid highway projects could not be approved for any state with a speed limit in excess of fifty-five miles per hour. 23 U.S.C. § 154(a).

On June 14, 1985, the Nevada legislature enacted a statute authorizing the Nevada State Department of Transportation to establish speed limits up to seventy miles per hour on highways and roads within the state. See NRS 484.369. The Nevada statute was to go into effect on July 1, 1986, but was to remain in effect only so long as no federal funds were withheld from the state. On July 1,

1986, at 7:30 a.m., the Nevada Department of Transportation established a speed limit of seventy miles per hour on a thirty-three mile section of Interstate 80. At approximately 7:31 a.m. on July 1, 1986, the Federal Highway Administration informed the state that it was withholding approval of federal funds for a designated highway project which had previously been submitted for approval and that it would be unable to approve funds for other projects until the state resumed compliance with the federal law. The Nevada statute expired by its own terms, and the fifty-five mile per hour speed limit was restored. That same day, the state of Nevada filed this action.

The federal government moves for summary judgment claiming, among other things, that Section 154 was enacted within Congress's discretion under the spending power authority of Article I, Section 8, Clause 1, of the Constitution.

The spending power or General Welfare Clause states: "The Congress shall have the power . . . to lay and collect taxes, duties, imports and excises to pay the debts and provide for the common defense and general welfare by the United States . . . ."

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld a "minority business enterprise" provision of the Public Works Employment Act of 1977, which requires that, absent administrative waver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses of minority group members.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against

> constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.

Id. at 474.

The defendants place great reliance upon South Dakota v. Dole, 107 S.Ct. 2793 (1987). The state of South Dakota brought an action challenging the constitutionality of a federal statute conditioning states's receipts of federal highway funds on adoption of a minimum drinking age of twenty-one. The Supreme Court affirmed the lower courts in finding no constitutional impediment to Congress's action under the spending power. The court found that in South Dakota the spending power was not being used to induce the state into an unconstitutional activity, nor would the raising of the state drinking age to twenty-one violate anyone's constitutional rights. Such a regulation was found to be neither coercive or compul-

sive.

The grant of federal highway funds to the state of Nevada conditioned upon the state's adherence to federal speed limit policy would not be an indirect achievement of an objective which Congress is not empowered to achieve directly.

In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the court stated:

> [l]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'

Id. at 17.

In Federal Energy Regulatory Com'n v. Mississippi, 102 S.Ct. 2126 (1982), the State of Mississippi Public Service Commission sought a declaratory judgment that Titles I and II and Sections 210 of

Title II of the Public Utility Regulatory Policies Act were unconstitutional under the commerce clause and the tenth amendment. The court stated: "We recognize, of course, that the choice put to the states . . . may be a difficult one . . . . Yet in other contexts the court has recognized that valid federal enactments may have an effect on state policy - and may, indeed be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority." Id. at 766. See Oklahoma v. CSC, 330 U.S. 127 (1947) (court upheld congressional power to attach conditions to grant in aid received by the states, although the condition under attack involved an activity that "the United States is not concerned with, and has no power to regulate.")

In Lau v. Nichols, 414 U.S. 563 (1974), an action was brought by students of Chinese ancestry who did not speak

english for relief against alleged unequal educational opportunities in that they were not provided english language instruction. The San Francisco School System was faced with the possible loss of its federal financial assistance due to its noncompliance with federal laws prohibiting discrimination in federally assisted school districts. See 42 U.S.C. § 2000d-1. The district and Ninth Circuit courts found against the plaintiffs, however, the Supreme Court reversed:

> The Federal Government has power to fix the terms on which its money allotment to the States shall be disbursed. Citing Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1927). Whatever may be the limits of that power, citing Steward Machine Co. v. Davis, 301 U.S. 548 (1937), they have not been reached here.

Id. at 570.

The state of Nevada argues that the Secretary's withholding of highway project approval violated 5 U.S.C. §

706(A)(B) which states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. _The reviewing court shall
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

This Court agrees with the contention of the Secretary that Section 154 is written without discretion. When the state of Nevada implemented a speed limit in excess of the federal statutory limit, the Secretary had no choice but to withhold federal highway funds. Such a decision by the Secretary cannot be an abuse of discretion.

Attorneys for the plaintiff

apparently believe that if this Court attempts to distinguish the authorities cited and holds that the speed limit condition in the Emergency Highway Conservation Act is unlawfully coercive and an infringement on powers reserved to the state by the Tenth Amendment, the decision will eventually reach the United States Supreme Court and be affirmed. There is no reason to believe this. Just three months ago the Supreme Court denied certiorari in a much stronger case than this one. Alabama v. Lyng, 811 F.2d 567 (11th Cir. 1987), cert. denied, 108 S.Ct. 80. The decision in Lyng dealt with a condition in the Food Security Act of 1985 which prohibited states which participated in the Food Stamp Program from collecting state or local sales taxes on items purchased with food stamps. Alabama had a choice between abandoning its entitlement to $287,000,000 worth of good [sic] stamps

for its citizens or giving up approximately $11,500,000 in state sales tax revenues. The condition in the Food Security Act was upheld despite the hard choice it imposed on the State of Alabama and despite its impact on the state's own taxing power.

In consideration of the premises,

IT HEREBY IS ORDERED that defendants' motion for summary judgment is granted and this action is dismissed.

DATED: January 12, 1987.

/s/ Bruce R. Thompson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.
_____/

Case No. CV-N-86-318-BRT

JUDGMENT IN A CIVIL CASE

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is hereby entered granting defendant's Motion for Summary Judgment and dismissing the action, pursuant to Order of the Court.

DATED: January 14, 1988.

CAROL C. FITZGERALD, Clerk

/s/ Colleen Larsen
By: Deputy Clerk

APPENDIX C

23 U.S.C. § 154 (1986), in pertinent part:

(a) The Secretary of Transportation shall not approve any project under section 106 in any State which has (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour, or (2) a speed limit on any other portion of a public highway within its jurisdiction which is not uniformly applicable to all types of motor vehicles using such portion of highway, if on November 1, 1973, such portion of highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. A lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. Clause (2) of this subsection shall not apply to any portion of a

highway during such time that the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of a highway. (emphasis added).

23 U.S.C. § 154(a) (1987), in pertinent part:

(a) The Secretary of Transportation shall not approve any project under section 106 in any State which has (1) a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour other than a highway on the Interstate System located outside of an urbanized area of 50,000 population or more, (2) a maximum speed limit on any highway within its jurisdiction on the Interstate System located outside of an urbanized area of 50,000 population or more in excess of 65 miles per hour, or (3) a speed limit on any other portion of a public highway within

its jurisdiction which is not uniformly applicable to all types of motor vehicles using such portion of highway, if on November 1, 1973, such portion of highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. A lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. Clause (3) of this subsection shall not apply to any portion of a highway during such time that the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of a highway.

APPENDIX D

23 U.S.C. § 101(b) (1987), in pertinent part:

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent

of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirty-four years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending September 30, 1990, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

It is further declared that since the Interstate System is now in the final phase of completion, it shall be the national policy that increased emphasis be placed on the construction and reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection, in order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

APPENDIX E

Nevada Revised Statute § 484.369 (1985):

484.369 Speed zones and signs; study of traffic; speed limit on highways. [Effective July 1, 1986, or on the date on which a maximum speed limit greater than 60 miles per hour authorized by the Federal Government takes effect, whichever is earlier. Expires by limitation on the date money is first withheld, if the Federal Government withholds money from this state as a result of increased speed limits.]

1. Except as limited by subsection 3, the department of transportation may prescribe speed zones, and install appropriate speed signs controlling vehicular traffic on the state highway system as established in chapter 408 of NRS through hazardous areas, after necessary studies have been made to determine the need therefor, and to eliminate speed zones and remove the

signs therefrom whenever the need therefor ceases to exist.

2. After the establishment of a speed zone and the installation of appropriate signs to control speed, it is unlawful for any person to drive a motor vehicle upon the road and in the speed zone in excess of the speed therein authorized.

3. The department shall conduct a study of traffic and determine which highways and roads in this state may be safely traveled at speeds up to 70 miles per hour. Unless a national maximum speed limit is set by the Federal Government at a speed greater than 60 miles per hour, the department shall establish a speed limit not higher than 70 miles per hour for any system of highways in this state.

(2)

No. 89-696

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEVADA, PETITIONER

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the federal statute requiring States to adopt a maximum speed limit as a condition for receipt of federal highway funds is constitutional.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 884 F.2d 445 (9th Cir. 1989). The order of the district court (Pet. App. 43a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 31, 1989. The petition for certiorari was filed October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the Arab oil embargo of 1973, Congress enacted the Emergency Highway Energy Conservation Act, Pub L. No. 93-239, 87 Stat. 1046, which precluded the Secretary of Transportation from approving federal funding for highway projects in States that have a maximum speed limit in excess of 55 miles per hour. S. Rep. No. 1111, 93d Cong., 2d Sess. 17 (1974). Although the primary purpose of the Act was to promote energy conservation, Congress also believed that the lower speed limit would produce safety benefits in the form of reduced accident fatalities and injuries. See 119 Cong. Rec. 39,257 (1973) (Rep. Blatnick); *id.* at 39,258 (Rep. Cleveland); *id.* at 41,646 (Sen. Stafford).

One year thereafter, Congress enacted the Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, 88 Stat. 2281, now codified at 23 U.S.C. 154(a), making permanent the condition that "[t]he Secretary of Transportation shall not approve any [federal-aid highway] project * * * in any State which has * * * a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour."[1] In enacting this provision, Congress emphasized again both the energy conservation and safety benefits of the law. See H.R. Rep. No. 1567, 93d Cong., 2d Sess. 9-10 (1974).[2]

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[1] Under the federal highway program, a state highway department submits plans for each proposed project, which the Secretary must approve before committing federal funds to support the project. 23 U.S.C. 106.

[2] See also 120 Cong. Rec. 30,820 (1974) (Sen. Stafford); *id.* at 30,821 (Sen. Randolph); *id.* at 30,861 (Sen. Montoya); *id.* at 40,151 (Rep. Blatnick); *id.* at 40,155 (Rep. Wright); *id.* at 40,157 (Rep. Clausen); *id.* at 40,683 (Sen. Randolph);

2. In 1985, the Nevada legislature enacted legislation authorizing the Nevada Department of Transportation to establish speed limits up to 70 mph on highways and roads within the State. Nev. Rev. Stat. § 484.369 (1967); Pet. App. 62a-63a. The higher speed limits were to go into effect on July 1, 1986, but were to expire if federal funds were withheld as a result. Pet. App. 45a, 62a.

On July 1, 1986, the Nevada Department of Transportation established a speed limit of 70 mph on a 3-mile section of Interstate 80. Pet. App. 45a-46a. The Federal Highway Administration immediately informed the State that it was withholding approval of federal funds for a designated highway project that had previously been submitted for approval, and that it would be unable to approve funds for other projects until the State resumed compliance with federal law. The Nevada statute then expired by its own terms, and the 55 mph speed limit was restored. Pet. App. 46a.

3. On the same day, the State filed this action, alleging that 23 U.S.C. 154 was unconstitutional and seeking injunctive and declaratory relief against its enforcement. The district court dismissed the complaint, holding that conditioning the grant of federal highway funds on adherence to a federal speed limit was a valid exercise of Congress's spending power, Art. I, § 8, Cl. 1, and did not infringe on powers reserved to the States by the Tenth Amendment. Pet. App. 43a-54a.

On April 2, 1987, while the case was on appeal, Congress amended the statute to permit the States to raise the maximum speed limit on certain rural

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id. at 40,908 (Rep. Cleveland); *id.* at 40,909 (Rep. Kluczynski); *id.* at 40,912 (Rep. Wright).

highways in the Interstate system to 65 mph. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 174, 101 Stat. 218, amending 23 U.S.C. 154.[3] The court of appeals held that this amendment did not moot the case, accepting the State's position that the revised 55/65 mph limit would still conflict with the 70 mph state limit. Pet. App. 36a-37a n.1.[4]

a. In the court of appeals, the State's principal argument was that the funding condition constituted "coercion," because the highway funds to be withheld from any State with a speed limit violating the condition would constitute up to 95% of the cost of highway projects.[5] The court of appeals, however, found it unnecessary to determine whether the funding condition was coercive.[6] Pet. App. 13a-18a. In-

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[3] Congress subsequently allowed States in some circumstances to impose a 65 mph limit on certain rural, non-Interstate highways. 23 U.S.C. 154 note (Supp. V 1987).

[4] Paragraph 3 of the state statute provides for establishment of a speed limit of up to 70 mph "[u]nless a national maximum speed limit is set by the Federal Government at a speed greater than 60 miles per hour." Nev. Rev. Stat. § 484.369; Pet. App. 63a. Since the 65 mph limit applies only to certain rural highways, the Federal Government has not established a "national maximum speed limit" that is "greater than 60 miles per hour." Therefore, while the new 65 mph limit reduces the practical importance of the dispute, we agree with the State that the case is not moot.

[5] Under 23 U.S.C. 120, the federal share of approved highway projects generally may not exceed 95% of the total cost of the project.

[6] The court observed that the "elusive[]" coercion test has been "infrequently applied in federal case law, and never in

stead, the court found that the purposes of the coercion inquiry are adequately served if the funding condition could itself have been enacted as a direct regulation. In the court's words, "if the congressional action passes muster under the Commerce Clause (or some other non-Spending power), and the restraints of the Tenth Amendment, * * * there can be no reason to fear that the federal government is unconstitutionally intruding into areas of uniquely state concern." Pet. App. 21a. If Congress could achieve a national maximum speed limit under the Commerce Clause, "it may also achieve that result through the more gentle commands of the Spending Power." Pet. App. 18a.

b. The court of appeals concluded that the federal government has ample authority to establish a national speed limit under the Commerce Clause. Noting that Nevada's attempt to create a 70 mph speed limit covered only a portion of I-80, which is part of the Interstate highway system (Pet. App. 40a n.13), the court pointed out that "the interstate highways, and the feeder roads that serve them, are the arteries of national commerce" (Pet. App. 23a-24a), and that a federal speed limit is rationally related to pre-

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favor of the challenging party," Pet. App. 15a (citing *Oklahoma* v. *Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981)). Moreover, the court noted that the determination as to whether the threatened withholding of federal highway funds would be coercive raises a series of "unanswered questions," such as whether the relevant inquiry is into the percentage of programmatic funds lost, the percentage of the federal share that is withheld, the proportion of the State's income that would be required to replace the lost funds, the availability of alternative funding, or the State's general willingness to impose taxes comparable to those imposed by other States. Pet. App. 15a-16a.

serving safety on these roads and conserving fuel. Pet. App. 23a-28a.

c. Turning to the question whether congressional action pursuant to the Commerce Clause to establish a federal speed limit would violate the Tenth Amendment, the court relied on *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), to conclude that "absent any 'extraordinary defect' in the national political process, Nevada's forum for raising a claim of infringed sovereignty lies with the legislature, not the judiciary." Pet. App. 30a (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988)). No such "extraordinary defect" was claimed here. Pet. App. 30a.

Even leaving *Garcia* aside, the court of appeals concluded that a national speed limit on interstate roads would not infringe any integral state function, since "the control of roads and highways has not traditionally fallen under plenary state control but under the cooperative agreement of state, local, and federal officials." Pet. App. 31a-32a. Nor did the court accept petitioner's contention that a national speed limit would "commandeer" the State's regulatory power, see *FERC* v. *Mississippi*, 456 U.S. 742 (1982). As the court explained:

> [T]he national speed limit requires the state police to enforce a standard only marginally different from the ordinary state rule. The state regulatory machinery is not diverted from its regular duties but continues to enforce the identical type of rule it has traditionally implemented. That the specific speed limit it now enforces results indirectly from a federal statute instead of exclusively from a state statute has little or nothing to do with the nature of the function performed by the state officers.

Pet. App. 34a-35a. See also *South Carolina* v. *Baker*, 485 U.S. at 513-515. Thus, the court of appeals held that because enactment of a national speed limit would be well within the power of Congress, the funding condition at issue here is also a valid exercise of congressional power.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), this Court upheld a federal statute that withheld a portion of a State's federal highway funds if the State did not adopt a minimum drinking age of twenty-one. Holding that the statute was constitutional, the Court articulated four limitations on the spending power. The federal speed limit is well within these limitations.

First, the Court stated that "the exercise of the spending power must be in pursuit of 'the general welfare.'" 483 U.S. at 207. In determining whether an exercise of the spending power is in the "general welfare," courts must "defer substantially" to the judgment of Congress. *Ibid.* The 55 mph funding condition plainly complies with this restriction, since it was enacted in response to national concerns about energy conservation and highway safety. See S. Rep. No. 1111, 93d Cong., 2d Sess. 17 (1974); H.R. Rep. No. 1567, 93d Cong., 2d Sess. 9-10 (1974).[7]

[7] In light of the "substantial deference" due to Congress' determination of what is in the "general welfare," the Court has "questioned whether 'general welfare' is a judicially enforceable restriction at all," *Dole*, 483 U.S. at 207 n.2 (citing *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) (*per curiam*)). In this light, the State's claim (Pet. 14-15, 24-25) that the

Second, the Court stated that Congress must condition its grants " 'unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' " *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). This limitation is not at issue in this case.

Third, the Court read prior cases to "suggest[] (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' " *Dole*, 483 U.S. at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). In this case, as in *Dole*, "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel." 483 U.S. at 208. Encouraging lower speed limits on the highways is also directly related to the federal interest in conserving energy.

Finally, the Court stated that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Dole*, 483 U.S. at 208. However, that means only that the Spending Power "may not be used to induce the States to engage in activities that would themselves be unconsti-

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current speed limits of 65 mph in some rural areas and 55 mph in more populated areas do not serve interests of safety and economy—and thus do not serve the "general welfare"—is untenable. Certainly, the fact that Congress has decided that a 65 mph limit is reasonably safe and economical on some rural highways does not give license to the courts to second-guess its simultaneous decision that the same speed limit in more populated areas would be both unsafe and uneconomical—and would therefore disserve the "general welfare."

tutional." *Id.* at 210. Here, as in *Dole*, if the State were "to succumb to the blandishments offered by Congress * * *, the State's action in so doing would not violate the constitutional rights of anyone." *Id.* at 211.

2. The Court in *Dole* also canvassed the possibility that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " 483 U.S. at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). Petitioner argues that there is coercion here because if it refuses to comply with the prescribed maximum speed limit, it will lose all its federal highway funds. By contrast, petitioner points out that only 5% of the federal highway funds otherwise obtainable by the State were at issue in *Dole*.

As the court of appeals properly determined, however, the purpose of any coercion limitation on the spending power is not implicated if Congress could directly mandate the conduct it seeks to encourage by use of its spending power. The obvious purpose of the coercion limitation is to place some restriction on the use of federal funding conditions to achieve goals beyond the power of Congress to achieve by direct regulation. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 475 (1980) (opinion of Burger, C.J.). This purpose has no relevance where Congress could constitutionally impose its will by some means other than the spending power. Thus, as the court of appeals correctly concluded, if direct regulation is allowable, then the threat to withhold funds, which is at most "a lesser form of coercion," must also be valid. Pet. App. 20a.[8]

[8] In other cases, funding conditions challenged under the Tenth Amendment have been sustained despite the fact that

The two decisions of this Court relied upon by petitioner both involved attempts to achieve results that may well have been beyond Congress's power to achieve directly. In *Dole*, the Court assumed *arguendo* that the Twenty-First Amendment placed the imposition of a national minimum drinking age beyond the regulatory authority of Congress. 483 U.S. at 206. And in *United States* v. *Butler*, 297 U.S. 1 (1936), the only case striking down a federal funding condition, the parties agreed that the legislative scheme at issue was beyond the direct regulatory power of Congress. *Id.* at 63-64. The *Butler* Court itself phrased the coercion issue as whether a federal statute may "purchase a compliance *which the Congress is powerless to command.*" *Id.* at 70 (emphasis added).

In this case, in contrast, it is clear that Congress has substantial power under the Commerce Clause to regulate safety and fuel economy on interstate highways. See *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Indeed, such regulation falls well within the traditional federal interest in safe use of the channels of interstate com-

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noncompliance would entail loss of *all* federal funds under the program involved. *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (3-judge court), aff'd, 435 U.S. 962 (1978) (loss of all funding under more than 40 federal health assistance programs); *Alabama* v. *Lyng*, 811 F.2d 567 (11th Cir.), cert. denied, 484 U.S. 821 (1987) (loss of all food stamp funds); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 413 (D.C. Cir. 1981) (loss of all Medicaid funds). See also Pet. App. 15a-17a (discussing various factors, aside from percentage of federal grant tied to the condition, that might be thought relevant to any coercion inquiry).

merce. See 49 U.S.C. App. 2505 (Supp. IV 1986) and 49 U.S.C. 3102 (federal regulation of commercial motor vehicle safety); 45 U.S.C. 421 *et seq.* (federal regulation of railroad safety); 49 U.S.C. App. 1421 *et seq.* (federal regulation of aviation safety). Therefore, because Congress could act directly to achieve what it seeks indirectly to encourage through the use of the spending power at issue in this case, the inquiry into whether the funding condition at issue here is coercive is unnecessary.

3. Petitioner's request (Pet. 17) that the Court apply the reasoning of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to this case in effect asks the Court to re-examine its decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), in which *National League of Cities* was overruled. See also *South Carolina* v. *Baker*, 485 U.S. 505, 512-513 (1988). As the court of appeals recognized (Pet. App. 31a-32a), however, control of highways has traditionally been a cooperative effort of federal, state, and local authorities. Consequently, there is no reason to believe that the result in this case would be any different under the "traditional governmental functions" test of *National League of Cities*.[9]

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[9] Petitioner cites two sources in support of its contention that regulation of highways is a "traditional State function." Its reliance on both is misplaced. Far from recognizing an exclusive state power over maximum rates of speed, the statute petitioner cites—23 U.S.C. 145—simply expresses Congress's decision to permit the States to determine which highway projects shall be federally funded. The statute thus emphasizes precisely the cooperative federal and state control over the highways on which the court of appeals relied; it is entirely consistent with Congress's determination in 23 U.S.C. 154 that federal funding would be available to a State only if

CONCLUSION

The petition of a writ of certiorari should be denied.

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JANUARY 1990

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it conformed to the 55/65 mph speed limits. See Pet. 11-12. Nor do the cases cited by petitioner (Pet. 12-13) that have adverted to the power of the States to regulate their own highways support petitioner's contention that States have exclusive constitutional power over their highways. Both cases cited by petitioner, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 523 (1959), and *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 444 (1978), struck down state highway regulations under the dormant Commerce Clause. They thus necessarily establish that there is a substantial federal interest—exercisable by Congress if it chooses to do so—in regulation of the nation's highways. See Pet. App. 24a.

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